IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,

v.

RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

No. ———.

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR THE WRIT OF CERTIORARI

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Statement 2

Specification of Errors to be Urged 2

Summary of Argument 3

Argument 7

Nature of the Action. The action involves the loss of goods while being carried by a common carrier of goods for hire, and not the loss of goods while being carried as baggage by a common carrier of passengers for hire 7

A common carrier of goods for hire is liable in Indiana as an insurer of goods lost by such carrier excepting by act of God, or the public enemy, inherent defect in the goods or the act or default of the owner or shipper 7

The carriers here were engaged as carriers of goods for hire in carrying trunks containing merchandise as well as trunks containing personal effects 8

It is the duty of the common carrier of goods for hire to inquire of the shipper respecting the value of the goods 9

The value of the goods carried has no relation to the liability of the carrier as an insurer. The Circuit Court of Appeals has erroneously applied the rule governing the liability of a carrier of passengers for the loss of the passengers' baggage to the case here of a carrier of goods for hire 10

The cases cited by the Circuit Court of Appeals do not sustain the opinion of that court 12

TABLE OF CASES

Page

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 143 N. E. 640 ..... 3, 8

Atlantic Coast L. R. Co. v. Campen Bros. Co., 114 Fla. 386, 154 So. 131 4

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434 ..... 3, 8

Chicago R. Co. v. Thompson, 19 Ill. 578 10

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 83 N. E. 710 ..... 3, 8

Doyle v. Kiser, 6 Ind. 242 ..... 6, 13

Drinkwater v. Quenell, (Eng.) 7 Mod. Rep. 248 5

Everett v. Southern Express Co., 46 Ga. 303 10

Gibbon v. Paynton, 4 Burr. 2298, 98 Rep. 199 10

Gilman v. Postal Telegraph, (N. Y.) 48 Misc. 372 10

Goldberg v. New York Cent. & H. R. R. Co., 149 N. Y. Supp. 629 5

Gorham Mfg. Co. v. Fargo, (N. Y.) 45 How. Prac. 90 4

Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 S. Ct. 151 .. 4, 9

Hollister v. Nowlen, (N. Y.) 19 Wend. 234 4

Humphryes v. Perry, 148 U. S. 627, 13 S. Ct. 711 ..... 6, 12

Kenrig v. Eggleston, (Eng.) 92 Eng. Rep. 932 5

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210; 176 N. W. 763 ..... 4, 12

Merchants Despatch Transportation Co. v. Boles, 80 Ill. 473 4

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354 ..... 4, 12, 15

Muser v. The American Express Co., 1 Fed. 382 4

Page

Nathan v. Woolverton, 127 N. Y. Supp. 442, affd. 134 N. Y. Supp. 469 15

Orange Co. Bank v. Brown, (N. Y.) 9 Wend. 115 4

Parmelee v. Lowitz, 74 Ill. 116 ..... 4, 12

Phillips v. Earle, (Mass.) 8 Pick. 182 5

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 35 N. E. 703 ..... 3, 8

Relf v. Rapp, (Pa.) 3 Watts. & S. 21 5

Riley v. Horne, (Eng.) 5 Bing. 217 5

Rosenfeld v. The Peoria, Decatur & Evansville Ry. Co., 103 Ind. 121, 2 N. E. 344 9

Sewall v. Allen, (N. Y.) 6 Wend. 335 4

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199 ..... 4, 12

Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79 14

Texas Express Co. v. Scott, 2 Texas Court of Appeals, Civil Cases, Par. 74 5

Tichburne v. White, (Eng.) 1 Aleyn 93 5

Toledo, Wabash & Western Ry. Co. v. Hammond, 33 Ind. 379 ..... 6, 14

Walker v. Jackson, (Eng.) 10 M. & W. 167 5

Wright v. Adams Express Co., 43 Pa. Super. Ct. 40 5

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BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 118 Fed. (2d) 864. The District Court did not give a written opinion.

JURISDICTION

The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals became final April 9, 1941 (R. 167), upon the overruling, on that day, of the appellants' petition for a rehearing, timely filed (R. 122) under the rules of the Circuit Court of Appeals. This petition for certiorari was filed before the expiration of three months after April 9, 1941.

STATEMENT

An adequate statement of the case having been made in the petition for certiorari, for brevity a further statement of the case is not here made.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that a common carrier of goods for hire is not liable as an insurer of goods entrusted to the carrier, but is liable only for loss due to the negligence of the carrier, where the goods entrusted to the carrier are valuable jewelry, where the carrier is uninformed of the nature and value of the goods, and omits to make any inquiry of the shipper, there being present no representation by the shipper, no fraud on the part of the shipper, and no contract limiting the liability of the carrier.

2. In applying to the case of a common carrier of goods for hire for the loss of good entrusted to him the rule of liability applicable only to the case of a carrier of passengers for hire for the loss of the baggage of a passenger carried as an incident to the carrier's contract for the transportation of the passenger.

3. In holding that the case of *Toledo, Wabash & Western Ry. Co. v. Hammond,* 33 Ind. 379, is authority in support of the decision of the Circuit Court of Appeals in the case at bar, since the cited case was one involving the liability, not of a common carrier of goods for hire, but of a common carrier of passengers for hire, the property lost in the cited case being carried as an incident to the carriage of the passenger, and limited, therefore, to baggage (or personal effects) excluding merchandise.

SUMMARY OF ARGUMENT

I. A common carrier of goods for hire is liable as an insurer for the loss of the goods entrusted to such carrier, excepting loss resulting from an Act of God, the public enemy, inherent defect in the property carried, or from the act or default of the owner or shipper.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388, 35 N. E. 703.

II. Where goods are delivered to a common carrier of goods for hire, and the carrier makes no inquiry of the shipper, and no false representation is made by the shipper of the nature and value of the goods and no artifice is

used by the shipper to mislead the carrier, the carrier is liable for the loss, however great may be the value. It is the duty of the common carrier of goods for hire to make an inquiry of the shipper, and to any inquiry the carrier is entitled to a truthful answer; but if he make no inquiry, the silence of the shipper does not free such carrier of goods for hire from full responsibility as an insurer for the loss of the goods entrusted to him.

Hart v. Pennsylvania R. Co., 112 U. S. 331, 340, 5 S. Ct. 151, 155;

Muser v. The American Express Co., 1 Fed. 382, 384;

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199, 208;

Parmelee v. Lowitz, 74 Ill. 116, 119;

Merchants Despatch Transportation Co. v. Boles, 80 Ill. 473, 477;

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764;

Atlantic Coast L. R. Co. v. Campen Bros. Co., 114 Fla. 386, 388, 154 So. 131, 133;

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354;

Orange Co. Bank v. Brown (N. Y.), 9 Wend. 86, 117;

Hollister v. Nowlen (N. Y.), 19 Wend. 234, 238;

Gorham Mfg. Co. v. Fargo (N. Y.), 45 How. Prac. 90, 92;

Sewall v. Allen (N. Y.), 6 Wend. 335, 364;

Goldberg v. New York Cent. & H. R. R. Co., 149 N. Y. Supp. 629, 630;

Relf v. Rapp (Pa.), 3 Watts. & S. 21, 25;

Wright v. Adams Express Co., 43 Pa. Super. Ct. 40, 51;

Texas Express Co. v. Scott, 2 Texas Court of Appeals, Civil Cases, Par. 74;

Phillips v. Earle (Mass.), 8 Pick. 182, 184;

Riley v. Horne (Eng.), 5 Bing. 217, 220, 222;

Tichburne v. White (Eng.), 1 Aleyn 93;

Walker v. Jackson (Eng.), 10 M. & W. 161, 168;

Drinkwater v. Quenell (Eng.), 7 Mod. Rep. 248, 249;

Kenrig v. Eggleston, 92 Eng. Rep. 932.

III. In the case (not here present) where one purchases passenger transportation of a common carrier of passengers, the carrier's contract with its passenger is only to carry, as baggage, the personal belongings of the passenger suitable to the use of one in his station and to the object of his travel. In such case there is absent any entrusting by the passenger, absent any acceptance by the passenger carrier, of goods and merchandise, and absent any agreement by the passenger carrier to accept for carriage anything other than the personal belongings of the passenger; hence, in such case, and in such case only (not the case at bar), the carrier is not liable for the loss of goods and merchandise of the passenger if the passenger

do not disclose to the carrier the presence of goods and merchandise among his baggage. Such are the following cases cited by the Circuit Court of Appeals in its opinion in the case at bar:

Humphreys v. Perry, 148 U. S. 627, 13 S. Ct. 711;

Toledo, Wabash and Western Ry. Co. v. Hammond, 33 Ind. 379;

Doyle v. Kiser, 6 Ind. 242.

The case at bar is not a passenger case but the case of the carriage of goods for hire, and the rule of the cases cited by the Circuit Court of Appeals is not applicable to the case at bar.

ARGUMENT

Nature of the Action

This is an action against common carriers of goods for hire, for the loss of goods while being carried in virtue of a contract solely for the carriage of the goods lost.

This is not an action by a passenger against a common carrier of passengers for the loss of goods and merchandise received by a passenger carrier as an incident to the transportation of the passenger; and not the case, therefore, in which the carrier contracted only to transport the personal effects of the passenger.

The carriers here did not contract, either verbally or in writing, for a limitation of their liability.

The carriers here made no inquiries of the shipper and the shipper made no representation to the carriers respecting the value of the goods to be carried.

No fraud or artifice of the shipper was proven or found by the District Court.

The Liability of Common Carriers of Goods for Hire as Insurers in the Absence of Inquiry or Fraud

The rule is settled in Indiana that a common carrier of goods for hire is liable as an insurer for the loss of goods entrusted to him. The Indiana courts have not recognized or stated as exceptions to the foregoing rule of liability of a carrier of goods for hire any other than

the following: loss by Act of God or the public enemy, inherent defect in the goods, and the act or default of the owner or shipper.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388, 35 N. E. 703, 704.

The property entrusted to the respondent carriers was goods and merchandise, and the shipper paid the carriers for transporting them as goods and merchandise.

It is common knowledge, and the courts will take judicial notice of the fact, that trunks containing valuable merchandise such as jewelry, laces, furs, silks, dress models and the like, are carried in trunks by traveling salesmen and transported on passenger trains, and are carried to and from passenger depots by local transfer companies whose particular business is hauling trunks containing such merchandise, as well as trunks and other luggage containing the personal effects of travelers. The undisputed evidence is that the respondents were engaged in such business, and regularly hauled trunks of persons arriving at and departing from the union railroad passenger depot in the city of Indianapolis.

It was the duty of the respondents as common carriers of goods for hire to inquire of the shipper respecting the value of the contents of the trunk to be carried, or, by notice to or contract with the shipper, limit their liability, in order to avoid full responsibility as insurers for the loss of the goods. They made no such inquiry, gave no notice of any limitation upon their liability, and made no contract limiting their liability. It was not their practice to make any inquiry. There is no finding, nor any evidence, that notice of any rule of the carriers touching the disclosure of values was ever brought to the attention of the shipper.

In *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 340, 5 S. Ct. 151, 155, this court said:

> "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

In *Rosenfeld v. The Peoria, Decatur & Evansville Ry. Co.*, 103 Ind. 121, 124, 2 N. E. 344, 346, the Supreme Court of Indiana, in an action against a common carrier of goods for hire, said:

> "If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value

> upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier."

The value of the goods to be carried, whether high or low, has no relation to the liability of the carrier as an insurer.

It is no more required that the trunk or other receptacle containing the goods to be carried shall acquaint the carrier with the value of the goods than that the shipper shall in express words inform the carrier of the value of the goods to be shipped. It is instead the duty of the carrier to make inquiry. Neither the container nor the shipper is required to speak the value of the goods to be shipped.

Of course, the shipper must not dress the package so as to give it a mean appearance and expressly to indicate to the carrier that the package does not contain anything of value.

This is not a case in which the appearance of the package entrusted to the carrier spoke falsely that the package contained nothing of value, as in the case of *Chicago R. Co. v. Thompson,* 19 Ill. 578, where the shipper concealed money in a box containing feather beds, or *Gilman v. Postal Telegraph,* 48 Misc. (N. Y.) 372, where bank bills were wrapped in newspapers, or *Everett v. Southern Express Co.,* 46 Ga. 303, where a diamond ring was contained in a small paper bag tied with a string, or *Gibbon v. Paynton,* 4 Burr 2298, 98 Rep. 199, where 100 pounds sterling was hidden in an old mail bag stuffed with hay.

In the case at bar there was no evidence, nor was there any finding, that the trunk in question was of such nature

or construction or bore such markings as to indicate affirmatively that it contained property of inconsequential value. The undisputed evidence as to the appearance and construction of the trunk here is that it was of a type of construction known and recognized as a jeweler's trunk by persons experienced in handling baggage (R. 61, 62, 63).

There was no finding that the trunk was of such construction as to indicate what was contained in the trunk. The District Court found as a fact merely that there was nothing about the construction of the trunk to indicate to anyone that it contained property of great value, nor any marking on the trunk that would have advised persons handling it that it contained a large quantity of jewelry (R. 87). There was no finding of fraud on the part of the shipper, nor any evidence of any fraud, nor was the opinion of the Circuit Court of Appeals grounded upon any fraud of the shipper.

When a passenger delivers to the passenger carrier a trunk to be carried as free baggage, incidental to the contract for the transportation of the passenger, there is an implied representation that the trunk contains baggage, in the limited sense of that term; that is, the personal effects of the passenger. But no such implied representation obtains in the case where a shipper delivers a trunk for carriage under a contract for the carriage of goods and merchandise for hire wholly unrelated to the transportation of the shipper as a passenger. The carrier of goods to whom a trunk is delivered for transportation must act upon the fact commonly known to all persons that valuable goods and merchandise such as furs, silks, jewelry and laces are commonly and frequently carried in trunks by commercial travelers.

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764;

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199, 208;

Parmelee v. Lowitz, 74 Ill. 116, 119;

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354.

The implied representation to the railroad passenger carrier that a trunk tendered by a passenger for carriage as baggage contains only personal effects does not extend to a subsequent carrier of goods and merchandise for hire, like the respondents here, where such passenger and carrier status does not obtain.

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764.

THE CASES CITED BY THE CIRCUIT COURT OF APPEALS

The court cited and relied on *Humphreys v. Perry*, 148 U. S. 627, 13 S. Ct. 711. The cited case is not in point here. That was an action against a passenger carrier in virtue of a contract entered into by the passenger for the carriage of the passenger. The passenger checked a trunk on his passenger ticket. Nothing was paid by the passenger for the carriage of goods and merchandise. The passenger paid 25 cents excess on account of his baggage, but of that the Supreme Court said:

"The 25 cents extra paid by Mr. Perry on account of the weight of the trunk was paid merely for the overweight, and not at all in respect of the

> contents of the trunk. It was paid for so much overweight of personal baggage."

The principle of the decision in the cited case is this, and this simply, that since the passenger carrier never received, and the passenger never paid or promised to pay, any compensation for the *carriage of goods,* the carrier having been paid only for a passenger ticket, the passenger carrier never assumed any risk of loss as a *carrier of goods.*

Doyle v. Kiser, 6 Ind. 242, cited by the Court of Appeals, was an action by a passenger against a passenger carrier. The articles lost were not entrusted to the carrier as a carrier of goods. Their carriage was paid for only by the price paid for the carriage of the passenger. The articles lost, of the value of $3,357.37, were not personal baggage, nor merchandise, but gold. The question for decision was stated by the Indiana court itself thus:

> "And the question first presenting itself is: Are common carriers of passengers liable for articles of value not transported to supply any wants of the traveler, as such, on his journey, and not made known to the carriers or their agents, or paid for as freight, but put aboard of the conveyance, by the passenger, simply as luggage, and so treated by himself on his journey?"

In the cited case, the court held the passenger carrier was not liable, not because of fraudulent concealment in consequence of the failure of the passenger to inform the passenger carrier of the nature and value of the package, but because the thing lost, not being baggage, "never went to the possession of the proprietor of the packet-boat (the

carrier), and his servants had no authority from him touching it." Said the court in the cited case:

> "It was never in his charge; had it been he would have been liable; but he never became liable for it as a carrier * * *."

In the cited Indiana case the failure of the *passenger* to disclose the nature of the contents of the parcel lost was not held to establish fraud by concealment, but to disestablish any *contract for the carriage of goods.*

Toledo, Wabash and Western Ry. Co. v. Hammond, 33 Ind. 379, cited and chiefly relied on by the Circuit Court of Appeals, was an action by a passenger against a passenger carrier. The goods lost were checked on a passenger ticket. An examination of the transcript on file in the office of the Clerk of the Indiana Supreme Court discloses that the plaintiff testified, and the jury specially found, that his trunks were carried on the train on which he traveled; that what he paid the carrier was "20 dollars in Cleveland, Ohio, for two through tickets to Peru," and the agent gave him checks for his baggage.

In the cited case, a judgment in favor of the plaintiff was affirmed. But the cited case decides no point involved in the case at bar.

In *Staub v. Kendrick,* 121 Ind. 226, 23 N. E. 79, cited by the Circuit Court of Appeals in its opinion, the Indiana court held only that a catalogue for the *personal use* of a shipper was personal baggage. The court did *not* hold, in the cited case, that the carrier would not have been liable for the loss of such catalogue *if the catalogue had not been personal baggage.*

In *Staub v. Kendrick, supra,* the carrier (a local transfer man) had posted notices that he would not carry valises.

The shipper sued for the loss by the carrier of his valise. The shipper had no knowledge of such fact or notice. The court held the carrier liable for the value of the valise and its contents.

Nathan v. Woolverton, 127 N. Y. Supp. 442, affd. 134 N. Y. Supp. 469, cited by the Circuit Court of Appeals, is contrary to earlier, as well as later, New York cases, and contrary to the great weight of the English and American cases, cited under point II of petitioners' summary of the argument. Thus in *Morgan v. Woolverton,* 203 N. Y. 52, 96 N. E. 354, 355, the New York Court of Appeals said:

> "Baggage has been defined in the dictionary as 'trunks, * * * etc., which a traveler carries with him on a journey,' and a great volume of decisions and text law has fixed the status of baggage or articles 'carried as baggage' as that of property which is transported under or as an incident to the contract of transportation of the owner as a passenger. Under the principles which have been thus abundantly established, we do not define as 'baggage' in a proper sense property which is being moved by express or otherwise apart from and disconnected with the transportation of the person who owns the same, even though it be a trunk."

For these reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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